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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR MANUEL CERVANTES,

Defendant and Appellant.

2d Crim. No. B200387
(Super. Ct. No. 1163505)
(Santa Barbara County)

Victor Manuel Cervantes appeals from the judgment entered after a jury found him guilty of four counts of first degree robbery, one count of conspiracy to commit residential robbery, four counts of false imprisonment by violence, one count of first degree burglary, and four counts of assault with a semiautomatic firearm (Pen. Code, §§ 211, 182, subd. (a)(1), 236, 459, 245, subd. (b)).¹ As to the robbery counts, the jury also found true allegations that appellant acted in concert with two or more persons (§ 213). As to all counts, with the exception of the conspiracy count, the jury found that appellant personally used a firearm (§ 12022.53, subd. (a)(4)).

The trial court found that appellant had suffered two prior "strike" convictions for purposes of the Three Strikes law (§ 667, subds. (b)-(i)), a "serious" prior felony conviction (§ 667, subd. (a)) and had served a prior prison term (§ 667.5, subd. (b)). The court sentenced Cervantes to an aggregate term of 100 years to life plus 40

¹ All statutory references are to the Penal Code unless otherwise stated.

years, which consisted of four consecutive 25-years-to-life terms for each of the robbery counts pursuant to the Three Strikes law, plus four consecutive 10-year terms for each firearm enhancement. Sentences on the other counts and allegations were imposed and stayed.

Appellant contends that insufficient evidence was presented connecting him to the planning or execution of the robbery. Appellant also contends the trial court erred by refusing to strike one of his prior convictions because two of the prior convictions arose from the same incident. We reject his contentions and affirm.

Prosecution Case

Joseph Breen, David Cinquini and Jeremy Berger shared an apartment in the Isla Vista area of Santa Barbara. On November 19, 2004, at about 1:00 a.m., two armed men wearing ski masks entered the apartment and robbed the men of a safe containing marijuana, money, cell phones and keys.

The previous evening, Cervantes and his girlfriend, Jessica Pena, drove from Moreno Valley to Santa Barbara in a white Nissan Altima owned and driven by Raul Castellanos. A fourth person, Steven G., also was in the car. Castellanos testified that he needed money and Cervantes suggested they go to Santa Barbara and rob a marijuana dealer that Cervantes knew. Pena had a semiautomatic Glock pistol in her purse. Only Cervantes had been to Santa Barbara before that night. He had lived there for several years.

After arriving in Santa Barbara, Cervantes directed Castellanos to drive to an apartment where they met an acquaintance of Cervantes, Donald Dzukola, and a friend of Dzukola's. Castellanos, Steven G., Dzukola and his friend drove to a vacant lot near Breen's apartment. Cervantes and Pena walked and met the others at the lot. When they arrived, Pena asked Cervantes to put the Glock in the trunk of the car. Cervantes took the gun. Pena did not see him put the gun in the trunk. Dzukola and Cervantes walked from the vacant lot toward Breen's apartment building. Castellanos and Steven G. were told to stay outside the apartment and watch for police. Pena stayed in the car.

Dzukola and Cervantes broke into Breen's apartment. Dzukola carried a tazer gun and Cervantes carried the handgun Pena had in her purse. The roommates told police that both men wore ski masks and the man with the handgun had a Hispanic accent.

After the men entered the apartment, they encountered David Cinquini. The man with the handgun asked Cinquini where "Joe" was. Cinquini was forced into Breen's bedroom at gunpoint and told to lie face down on the floor. Berger was in Breen's bedroom. After ordering Berger to lie face down on the floor, the men took the roommates' cell phones, money and keys. The man with the handgun asked Breen where the safe was located. The men found the safe in Breen's closet, locked and bolted to a wall. The men tore the safe from the wall after Breen said he lost the key to it.

While the robbery was in progress, a neighbor, Max Bloom, knocked on the door of the apartment. According to Bloom, a Hispanic male with a shaved head wearing a black hooded sweatshirt with the hood covering his head answered the door, and put a large black handgun to his head after he went inside. As Bloom entered the apartment, he saw a second man in the hallway carrying a safe. Bloom was dragged into Breen's bedroom and told to lie face down on the floor. His cell phone was taken. During this time, the man with the tazer gun was talking on a two-way radio with someone outside the apartment.

Before leaving the apartment, the men said that they would shoot anyone who left the room. After the men left the apartment, Breen grabbed a samurai sword and ran out of the apartment. Berger followed Breen and saw a white male with a shaved head in the hallway. The man ran out of the house. Bloom called the police and reported the robbery.

While the robbery was in progress, two police officers were on foot patrol in the area. They encountered Castellanos and Steven G., thought they were acting suspiciously, and briefly questioned them. After being questioned by the officers, Castellanos and Steven G. split up. Castellanos said Dzukola gave him the safe to carry back to his car. Castellanos and Pena were arrested at the car after the officers saw a safe

in the back seat of the Nissan. Steven G. and Dzukola were apprehended a short time later. They were found crouching in the bushes near Breen's apartment. The police found a tazer gun, a two-way radio and a black watch cap with two holes in it lying on the ground next to them. Cervantes was not apprehended with the others.

Shortly after the robbery, Berger was taken to the police station for a field show-up. He identified Dzukola as the person he saw in the hallway after the robbery. Bloom also was taken to the police station for a field show-up. He did not recognize any of the individuals in the lineup.

On the night of the robbery, Bloom purportedly told one of the police officers that the two men who robbed him were wearing masks. Two weeks later, when interviewed by a different officer, Bloom denied saying that the men wore masks. He identified Cervantes as the person who answered the door and put a gun to his head from a six pack photo lineup. Bloom also identified appellant at the preliminary hearing and at trial and said he was certain of the identification.

The day after the robbery, police were notified by an area resident that a Glock handgun was lying in the street near Breen's apartment. Officers recovered the handgun and determined it was registered to Pena's father and fit the description of the gun used in the robbery. Pena admitted the gun was the one she carried with her to Santa Barbara. When Pena was in jail, she made tape-recorded telephone calls to Cervantes. In one of the calls, he also said his "baby's mom" picked him up in Santa Barbara that night. Cervantes talked about "what you lent to me." He said that "I hid it so well that they can't find it now" and that if the police had found it, they would have told Pena's father, because it was registered in her father's name.

Cervantes was apprehended on June 9, 2005, after attempting to flee from police.

Defense Case

Dr. Robert Shomer testified as an eyewitness identification expert that stress detrimentally affects the accuracy of eyewitness identifications, particularly when a weapon is involved. Shomer also discussed the difficulty of cross-racial identifications,

the effect of time on the accuracy of identifications and the problems with photographic lineup procedures. According to Shomer, Bloom's initial report that the robber wore a mask was probably more accurate than his subsequent description and identification of appellant in a lineup.

Discussion

Sufficiency of the Evidence to Support Conviction

Cervantes contends that insufficient evidence was presented at trial to show that he was one of the perpetrators of the crimes. He argues that Bloom's identification of him at trial was inconsistent with other witness testimony and his earlier statement to the investigating officer that both robbers had worn ski masks throughout the robbery. He also points out that no physical evidence links him to the robbery.

In reviewing the sufficiency of the evidence to support a conviction, we review the entire record and determine whether reasonable and credible evidence, and all reasonable inferences therefrom, support the decision of the trier of fact. (*People v. Carter* (2005) 36 Cal.4th 1114, 1156.) Reversal on the ground of insufficiency of the evidence is warranted only when ". . . upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Eyewitness identification may be sufficient to establish the defendant's identity. (See *People v. Boyer* (2006) 38 Cal.4th 412, 480 ["Identification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime"].) "[W]hen the circumstances surrounding the identification and its weight are explored at length at trial, where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court." (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.)

Sufficient evidence supports the jury's finding that Cervantes was one of the perpetrators of the robbery. Bloom identified appellant multiple times: three weeks after the robbery, at the preliminary hearing, and at trial. Bloom's claim that he was able to see appellant's face is not inconsistent with the statements of the other witnesses. While the

perpetrators could have been wearing masks in front of the other victims, Bloom was the only witness in the living room when Cervantes let Bloom into the apartment. It is a reasonable inference that Cervantes removed his mask before answering the door. The resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) The testimony of Cervantes's eyewitness identification expert also was for the jury to consider and evaluate. "[I]t is not our function to reevaluate the evidence to conclude whether the jury should have reached a different result on the theory that the evidence was close." (*People v. Prince* (2007) 40 Cal.4th 1179, 1281.)

That the police found no physical evidence linking Cervantes to the crime is immaterial as Bloom's eyewitness identification alone was sufficient evidence on which to base a guilty verdict. (*People v. Boyer, supra*, 38 Cal.4th at p. 480.) In addition, the jury heard telephone conversations between Cervantes and Pena in which he told Pena that he had disposed of the gun she had given him that night. There was sufficient substantial evidence to support the conviction.

No Error in Refusing to Strike Prior Conviction

Cervantes moved to strike one of his prior "strike" convictions on the ground that both offenses arose from a single incident. The trial court denied the motion finding that appellant's prior convictions arose from separate acts.

The Three Strikes law establishes a sentencing requirement which must be applied in every qualifying case unless "... in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) A trial court's decision not to dismiss a prior conviction is reviewed for abuse of discretion and will be upheld unless it produces an arbitrary, capricious or patently absurd result. (*Id.*, at p. 376.) In the absence of such a

showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives. (*Id.*, at pp. 376-377.)

Cervantes's prior two strikes arose from a knife assault on his pregnant girlfriend during which he threatened to kill her and her fetus and threatened her family. He was convicted of assault with a deadly weapon and making criminal threats. The assault with a deadly weapon conviction was based on the physical act of placing a knife to his girlfriend's body, and the criminal threats conviction was based on his verbal act of threatening to cut her and take her life.

Cervantes bases his argument that the two prior convictions resulted from a single criminal act on *People v. Benson* (1998) 18 Cal.4th 24, and *People v. Burgos* (2004) 117 Cal.App.4th 1209. In *Benson*, the court held that the Three Strikes law " must be interpreted to permit . . . a qualifying prior conviction to be treated as a strike." (18 Cal.4th at p. 36.) In a footnote, the court stated, "we need not and do not determine whether there are some circumstances in which two prior felony convictions are so closely connected—for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct—that a trial court would abuse its discretion . . . if it failed to strike one of the priors." (*Id.*, at p. 36, fn. 8.)

In *Burgos*, the court concluded that the trial court abused its discretion in refusing to dismiss a defendant's prior strikes for attempted carjacking and attempted robbery *in part* because the two offenses arose from the "single criminal act" of approaching a man and demanding his car. (*People v. Burgos, supra*, 117 Cal.App.4th at pp. 1216-1217.) The court also considered the defendant's criminal history in determining to strike one of his prior convictions.

Here, Cervantes's prior convictions did not arise from a single act. The assault with a deadly weapon conviction was based on the physical act of placing a knife to his girlfriend's body. The criminal threat conviction was based on his verbal threats to harm his girlfriend and her family. And, unlike the defendant in *Burgos*, Cervantes had a criminal history placing him within the spirit of the Three Strikes law, starting when he

was a juvenile, including felony burglary and assault. He also repeatedly violated parole and was repeatedly returned to prison. He was later deported to Mexico but reentered the United States illegally and committed the instant offenses. At the time of the instant offenses, appellant was on parole. The trial court properly exercised its discretion in not striking one of appellant's prior convictions.

The judgment is affirmed.

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PERREN, J.

We concur:

YEGAN, A.P.J.

COFFEE, J.

Brian E. Hill, Judge
Superior Court County of Santa Barbara

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